

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

BILLY WAYNE CIGGS, JR.,)	EDCV 06-1133 SVW (JC)
)	
Petitioner,)	
)	
v.)	ORDER ADOPTING-IN-PART THE
)	FINDINGS, CONCLUSIONS, AND
)	RECOMMENDATIONS OF UNITED STATES
THOMAS FELKER, Warden,)	MAGISTRATE JUDGE, AND GRANTING THE
)	PETITION FOR WRIT OF HABEAS CORPUS
Respondent.)	
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Pursuant to 28 U.S.C. section 636, the Court has reviewed the Petition, all of the records herein and the attached Report and Recommendation of United States Magistrate Judge. The Court approves and adopts the Magistrate Judge's Report and Recommendation in part. The Court fully concurs with the Magistrate Judge's discussion and analysis relating to the (1) bifurcation of trial, (2) admission of hearsay evidence, and (3) imposition of consecutive sentences. The Court disagrees, however, with respect to the imposition of an upper-

1 term sentence as to Count 2 (assault with a firearm). Finally,
2 although the Court agrees with the Magistrate Judge's conclusion
3 regarding the imposition of an upper-term sentence as to the firearm
4 enhancement on Count 2, the Court wishes to supplement the Magistrate
5 Judge's analysis of this issue.

6 **I. Upper-Term Sentence on Count 2**

7 The Court agrees with and adopts the Magistrate Judge's summary of
8 the applicable law regarding upper-term sentencing. See generally
9 Cunningham v. California, 549 U.S. 270, 127 S.Ct. 856, 166 L.Ed.2d 856
10 (2007); United States v. Booker, 543 U.S. 220, 125 S.Ct. 738, 160
11 L.Ed.2d 621 (2005); Blakely v. Washington, 542 U.S. 296, 124 S.Ct.
12 2531, 159 L.Ed.2d 403 (2004); Apprendi v. New Jersey, 530 U.S. 466, 120
13 S.Ct. 2348, 147 L.Ed.2d 435 (2000).

14 However, contrary to the Magistrate Judge's analysis, the Court
15 concludes that there are "grave doubts" regarding whether the jury
16 would have concluded beyond a reasonable doubt that the victims of
17 Petitioner's crime were "particularly vulnerable." See Butler v.
18 Curry, 528 F.3d 624, 648 (9th Cir. 2008) (applying harmless error
19 standard of Brecht v. Abrahamson, 507 U.S. 619, 113 S.Ct. 1710 (1993),
20 to determine whether to grant writ of habeas corpus based on state
21 courts' sentencing error). Accordingly, the Court concludes that the
22 state courts' unreasonable application of the Sixth Amendment was not
23 harmless error, and the action must be remanded to the state trial
24 court for resentencing.

25 **A. "Particularly Vulnerable Victim"**

26 The trial court imposed an upper-term sentence of four years with
27 respect to Count 2, assault with a firearm under Cal. Penal Code §
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1 245(a)(2). The court explained that "[t]he victim in this particular
 2 case was particularly vulnerable; this particular victim, sitting in a
 3 private car." (RT 553.)

4 One of California's aggravating sentencing factors is whether
 5 "[t]he victim was particularly vulnerable." Cal. R. Ct. 4.421(a)(3).
 6 The Ninth Circuit thoroughly explored the contours of this sentencing
 7 factor in Butler. In that case, the petitioner had been convicted of
 8 domestic assault and battery. The state trial court had imposed an
 9 upper-term sentence on the ground that the victim was particularly
 10 vulnerable because "she was attacked from behind." Butler, 528 F.3d at
 11 649. The Ninth Circuit held that the trial court's factual finding,
 12 although it was a permissible **legal** interpretation of the "vulnerable
 13 victim" rule, was not a harmless sentencing error because there were
 14 "grave doubts" that a jury would have reached the same conclusion
 15 beyond a reasonable doubt. Id. at 650 & n.19.

16 In reaching its conclusion in Butler, the Ninth Circuit summarized
 17 the applicable rules of state law. The Court agrees with the Ninth
 18 Circuit's summary:

19 Under California law, vulnerable means "'defenseless,
 20 unguarded, unprotected, accessible, assailable, one who is
 21 susceptible to the defendant's criminal act.'" *People v. Weaver*,
 22 149 Cal.App.4th 1301, 58 Cal.Rptr.3d 18, 27 (2007) (quoting *People*
 23 *v. Smith*, 94 Cal.App.3d 433, 156 Cal.Rptr. 502, 503 (1979)). A
 24 victim is "particularly" vulnerable only if he is vulnerable to a
 25 "special or unusual degree, to an extent greater than in other
 cases." *People v. Loudermilk*, 195 Cal.App.3d 996, 241 Cal.Rptr.
 208, 214 (1987). A victim is thus not "particularly" vulnerable
 where all victims of the crime of conviction are vulnerable in the
 same manner. See *People v. Bloom*, 142 Cal.App.3d 310, 190
 Cal.Rptr. 857, 865 (1983) (stating that "[a]ll victims of drunk
 drivers are 'vulnerable victims'"). . . .

26 In the overwhelming majority of cases, "particularly
 27 vulnerable victims" have had inherent personal characteristics
 28 that, sometimes in combination with the manner in which the crime
 was committed, render them more vulnerable than other victims.
 See, e.g., *People v. Bishop*, 158 Cal.App.3d 373, 204 Cal.Rptr.

502, 505 (1984) (victims were very young and of small stature); *People v. McGlothin*, 67 Cal.App.4th 468, 79 Cal.Rptr.2d 83, 87 (1998) (the victims were particularly vulnerable because they were elderly and were attacked in a parking lot late at night); *People v. Karsai*, 182 Cal.Rptr. 406, 416, 182 Cal.Rptr. 406 (Immigration and Nationality Act, § 208(d)(6), 8 U.S.C.A. § 1158(d)(6).1982) (victim was young and physically weak); *id.* ("While age and physical traits are not the only factors which may indicate particular vulnerability, they are the most obvious.").

The California courts have in a few cases relied on aspects of the status of the victim that are more changeable than age or physical frailty, but have done so only when the victim was seriously, if only temporarily, incapacitated. *People v. Hoover*, 77 Cal.App.4th 1020, 92 Cal.Rptr.2d 208, 215-16 (2000) (extremely intoxicated victim in domestic violence case); *People v. White*, 117 Cal.App.3d 270, 172 Cal.Rptr. 612, 618 (1981) (shooting a victim already incapacitated from earlier gunshot), *abrogated on other grounds by People v. Scott*, 9 Cal.4th 331, 353 n. 16, 36 Cal.Rptr.2d 627, 885 P.2d 1040 (1994); *Loudermilk*, 241 Cal.Rptr. at 214 (sleeping victim); *Smith*, 156 Cal.Rptr. at 503 (sleeping victims).

Butler, 528 F.3d at 649-50.

In light of those authorities, the Court is left with "grave doubts" as to whether the jury would have concluded beyond a reasonable doubt that the victims of Petitioner's crime were "particularly vulnerable." A jury **might** agree with the Magistrate Judge's conclusion that the victims "were effectively trapped in a car heading the wrong direction in a cul de sac, and were defenseless and at the mercy of the shooter, i.e., petitioner." (R&R at 24.) However, a jury might have concluded that the victims were **not** "vulnerable to a 'special or unusual degree, to an extent greater than in other cases.'" Butler, 528 F.3d at 649 (quoting *Loudermilk*, 195 Cal.App.3d 996, 241 Cal.Rptr. 208, 214 (1987)). Instead, the jury might reasonably have concluded that the victims of Petitioner's crime were "vulnerable in the same manner" as "all victims of the crime" of assault with a firearm. Id. (citing *People v. Bloom*, 142 Cal.App.3d 310, 190 Cal.Rptr. 857, 865 (1983)). In fact, the jury might have reasonably concluded that the

1 victims were **less** vulnerable than other victims of assault with a
2 firearm, given that the victims in this case were sitting inside a car
3 and were protected from Petitioner's bullets by a protective layer of
4 sheet metal.

5 Petitioner's case is distinguishable from the two most readily-
6 identifiable California cases involving gun-crime victims who were
7 driving their cars at the time of the crime. In People v. Eades, 95
8 Cal. App. 3d 688, 690, 157 Cal. Rptr. 223 (1979), the victim was
9 "particularly vulnerable" where he was driving his vehicle while the
10 defendant was in the back seat, the victim was shot by the defendant
11 from behind at "point-blank range," and the victim was unaware that the
12 defendant even had a gun. The court explained that the circumstances
13 of the crime left the victim with no opportunity to defend himself,
14 thus rendering him "particularly vulnerable." Id. Similarly, in
15 People v. Webber, 228 Cal. App. 3d 1146, 279 Cal. Rptr. 437 (1991), the
16 victim was a "particularly vulnerable" victim of false imprisonment
17 because he was driving his manual-transmission vehicle on city streets
18 at the defendant's gunpoint. The court explained that the defendant's
19 conduct placed the victim at a significant risk of getting into a car
20 accident; alternatively, the court explained that the police might have
21 viewed the victim as being an accomplice to the defendant's crime,
22 which placed the victim at the risk of being placed in a car chase or
23 other attack by police. Id. at 1170.

24 In the present case, a reasonable jury could conclude that the
25 victims of Petitioner's crime were not "particularly vulnerable"
26 because they were able to drive away from the crime and were protected
27 by a layer of sheet metal (i.e., their car). Unlike the victims in
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1 Eades and Webber, the victims of Petitioner's crime were not trapped in
2 an enclosed area with Petitioner, and were not rendered completely
3 helpless to protect themselves from Petitioner's gunshots. The Court
4 therefore concludes that there are "grave doubts" regarding the trial
5 court's decision to impose an upper-term sentence with respect to Count
6 2.

7 **B. Alternative Grounds for the Upper-Term Sentence**

8 In addition to the "particularly vulnerable victim" finding, the
9 trial judge appears to have provided alternative grounds for imposing
10 an upper-term sentence with respect to Count 2. The trial court
11 explained that "[t]he defendant didn't even know the victims. He just
12 shot at them apparently for fun because it was for the benefit of his
13 gang. So because of that and because I find the fact that the
14 defendant is youthful to be not particularly mitigating given his
15 hideous record, I am going to impose the aggravated upper term of four
16 years." (RT 553.)

17 The Court notes at the outset that its review is limited to the
18 trial judge's statement of reasons for the sentence. See Cal. R. Ct.
19 4.420(e) ("The reasons for selecting the upper or lower term shall be
20 stated orally on the record, and shall include a concise statement of
21 the ultimate facts which the court deemed to constitute circumstances
22 in aggravation or mitigation justifying the term selected.") (as
23 written at time of sentencing; subsequently amended in 2007); Cal.
24 Penal Code § 1170(b) ("The upper term may be imposed only when the
25 circumstances alleged to be in aggravation of the crime are found to be
26 true by the trial judge upon the evidence introduced at the hearing on
27 the motion and any evidence previously heard by the judge at the trial,
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1 and factual findings and reasons in support thereof are set forth on
2 the record at the time of sentencing.") (as written at time of
3 sentencing; subsequently amended in 2007).

4 Here, the trial court stated three reasons (aside from the
5 "particularly vulnerable victim") for imposing an upper-term sentence
6 on Count 2. First, that the crime was done for the benefit of
7 Petitioner's gang. Second, that the crime was done for fun. Third,
8 that the Petitioner had a "hideous record." (RT 553.)

9 First, with respect to the fact that Petitioner committed the
10 crime for the benefit of his gang, California's sentencing laws at the
11 time of the sentencing provided that "[a] sentencing court may not rely
12 on the same fact to impose a sentence enhancement and the upper term."
13 People v. Bowen, 11 Cal. App. 4th 102, 105, 14 Cal. Rptr. 2d 40 (1992)
14 (citing Cal. Penal Code § 1170(b); Cal. R. Ct. 4.420(c)). Here, the
15 trial court imposed a ten-year sentence with respect to a gang
16 enhancement under Cal. Penal Code § 186.22. It would therefore be
17 impermissible for the trial court to rely on the same facts to justify
18 an upper-term sentence on Count 2.

19 Second, to the extent that the trial court concluded that the
20 Petitioner committed the crime "for fun," this factual conclusion is
21 belied by the California Court of Appeal's conclusion that "[n]o reason
22 existed to shoot at the[victims] except as an act of intimidation."
23 (Lodgment 6, at 18.) A reasonable jury could conclude, as did the
24 Court of Appeal, that Petitioner acted for gang-related reasons rather
25 than personal ones. The Court therefore has "grave doubts" that a jury
26 would conclude beyond a reasonable doubt that an upper-term sentence is
27 justified because Petitioner committed the crime "for fun."
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1 Third, with respect to the fact that Petitioner had a "hideous
2 record," it is clear from the trial court's transcript that the upper-
3 term sentence was not based on Petitioner's criminal history. The
4 court stated that "I find the fact that the defendant is youthful to be
5 not particularly mitigating given his hideous record." Certainly, the
6 trial court would have been justified in relying on the Petitioner's
7 criminal record to impose an upper-term sentence. See Cal. R. Ct.
8 4.421(b)(2) ("The defendant's prior convictions as an adult or
9 sustained petitions in juvenile delinquency proceedings are numerous or
10 of increasing seriousness."). However, the trial court used
11 Petitioner's criminal history as a basis for cancelling out the
12 mitigating factor of Petitioner's youth; the trial court simply **did not**
13 use the criminal history as a basis for imposing an upper-term
14 sentence.

15 **C. Summary of Upper-Term Sentence on Count 2**

16 The Court therefore concludes that the trial court's upper-term
17 sentence on Count 2 was premised primarily on the "particularly
18 vulnerable victim" aggravating factor, and the Court has "grave doubts"
19 that a jury would agree with the trial court's conclusion on this
20 point. In addition, the trial court's three other apparent
21 justifications for the upper-term sentence are an inadequate basis for
22 concluding that the sentencing error was harmless. Accordingly, the
23 Petition for a Writ of Habeas Corpus must be granted, and the state
24 court must resentence Petitioner with respect to Count 2 pursuant to
25 the procedures outlined in People v. Sandoval, 41 Cal. 4th 825, 845-46,
26 62 Cal. Rptr. 3d 588, 161 P.3d 1146 (2007). See Chioino v. Kernan, 581
27 F.3d 1182, 1186 (9th Cir. 2009) ("Once it found a Cunningham violation,
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1 the district court should have remanded to the state trial court for
2 resentencing . . . under the procedures delineated in Sandoval.").

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4 **II. Upper-Term Sentence on Firearm Enhancement**

5 The trial court imposed an upper-term sentence of ten years for
6 the firearm enhancement on Count 2. See Cal. Penal Code § 12022.5.
7 The trial court stated that "the defendant sprayed this vehicle with
8 bullets and hit it several times. It's a miracle nobody was hurt or
9 killed. And again, I find that his youthfulness in light of his record
10 is not a factor in mitigation." (RT 553-54.)

11 Under Cal. R. Ct. 4.421(a)(1), the trial court may consider as an
12 aggravating circumstance that "[t]he crime involved great violence,
13 great bodily harm, threat of great bodily harm, or other acts
14 disclosing a high degree of cruelty, viciousness, or callousness." The
15 caselaw is clear that the act of "fir[ing] a gun into a car full of
16 people" satisfies this sentencing factor. Castillo v. Clark, 610 F.
17 Supp. 2d 1084, 1125 (C.D. Cal. 2009) (citing People v. Gutierrez, 10
18 Cal.App.4th 1729, 1736, 13 Cal.Rptr.2d 464 (1992)).

19 In light of this caselaw, the Court concurs with the Magistrate
20 Judge's conclusion that the sentencing error with respect to the
21 firearm enhancement was harmless. As the Magistrate Judge explained,
22 "no 'grave doubt' exists as to whether a jury would have found beyond a
23 reasonable doubt that spraying a vehicle with bullets and hitting it
24 several times involved a threat of great bodily harm to the victims,
25 rendering it a miracle that no one was hurt or killed. Accordingly,
26 any error in failing to submit this fact to the jury was harmless."
27 (R&R at 25.)
28

1 **III. Summary and Conclusions**

2 In light of the foregoing, the Court concludes that the California
3 courts unreasonably applied clearly established federal law, and the
4 trial court's sentence with respect to the four-year upper-term
5 sentence for Count 2 violated Petitioner's Sixth Amendment rights as
6 described in Cunningham v. California, 549 U.S. 270 (2007).

7 IT IS HEREBY ORDERED that Judgment be entered denying and
8 dismissing the Petition with prejudice with respect to all claims
9 except the sentencing error claim regarding the four-year upper-term
10 sentence on Count 2.

11 IT IS FURTHER ORDERED that a writ of habeas corpus shall be issued
12 remanding the action to the state trial court for resentencing as to
13 Count 2 (and only Count 2) in a manner consistent with the authorities
14 discussed in this Order.

15 IT IS FURTHER ORDERED that the Clerk serve copies of this Order,
16 the Magistrate Judge's Report and Recommendation and the Judgment
17 herein on Petitioner and counsel for Respondent.

18
19 LET JUDGMENT BE ENTERED ACCORDINGLY.

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21
22 DATED: August 10, 2010



23 STEPHEN V. WILSON
24 UNITED STATES DISTRICT JUDGE
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